ORIGINAL

NO. 81-5324

IN THE

SUPREME COURT OF THE UNITED STATES

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SUPREME COURT, U.S.

THOMAS RILEY,

Petitioner,

v.

GAYLE FRANZEN, Director
Illinois Department of
Corrections, and
LOU V. BREWER, Warden,
Stateville Correctional
Center,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI

TO THE

UNITED STATES COURT OF APPEALS, SEVENTH CIRCUIT

# BRIEF FOR RESPONDENT IN OPPOSITION

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## QUESTIONS PRESENTED FOR REVIEW

1. Whether a voluntary and uncoerced confession of a 16 year old juvenile should be suppressed for the sole reason that the police officers conducting the custodial interrogation failed to honor the defendant's request to see his parents.

2. Whether the four courts which have previously reviewed the record and have concluded that the petitioner's confession was voluntarily given were erroneous in reaching this conclusion.

3. Whether the denial by this Court of petitioner's earlier petition for certiorari which raised, on a substantially similar record, the identical grounds for relief should given precedential effect.

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# BRIEF FOR RESPONDENT IN OPPOSITION

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## OPINIONS BELOW

Petitioner's conviction was initially affirmed by the Illinois Appellate Court, First District, People v. Riley, 49 Ill. App. 3d 304, 364 N.E.2d 306 (1st Dist. 1977). Leave to appeal was denied by the Illinois Supreme Court, and certiorari was denied by this court. Riley v. Illinois, 435 U.S. 1000 (1978).

Petitioner's petition for writ of habeas corpus was denied, after evidentiary hearing, by the United States District Court for the Northern District of Illinois on October 7, 1980. United States ex rel. Riley v. Franzen, 79-C-1681 (Unpublished Memorandum). This decision was affirmed by the United States Circuit Court of Appeals for the Seventh Circuit in a decision reported at 653 F.2d 1153 (7th Cir. 1981).

## JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition For Writ of Certiorari. (Petition at 2) However, as treated more fully in the argument portion of this Brief in Opposition, respondent does not believe the petitioner has shown any compelling reason for this Court to grant the Writ of Certiorari.

## CONSTITUTIONAL PROVISIONS INVOLVED

Petitioner has quoted those provisions of the United States Constitution applicable to this case. (Petition at 2-3)

## STATEMENT OF THE CASE

Petitioner's rendition of the facts is adequate for purposes of this review. However, it should be noted that petitioner's characterization of his request to speak to his father as "a means of obtaining the services of an attorney" (Petition at 8) is an unwarranted inference not supported by the record below and directly contrary to the District Court's findings of fact. That court found as follows:

> "The principal exception we find to [petitioner's] credibility is the offer of proof to the effect that the petitioner would testify that the purpose for wanting to see his father was to ask him to obtain a lawyer. We reject this offer, not only because it is based upon petitioner's unexpressed mental processes but also because, even if admissable the testimony is unreliable and not believable...¶...The principal reason for wanting to confer with his father was, we find, in order to get some kind of moral support and perhaps to verify his age."
> United States ex rel. Riley v. Franzen, 79 C 1681 (Appendix B at 7-8).

## REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

### I

PETITIONER'S UNEXPLAINED REQUEST TO SEE HIS FATHER DURING CUSTODIAL INTERROGATION CANNOT BE CONSIDERED AN INVOCATION OF HIS RIGHTS TO COUNSEL AND TO SILENCE UNDER THE FIFTH AMENDMENT. THE SUBSEQUENT CONFESSION, BEING OTHERWISE VOLUNTARY AND KNOWING, WAS PROPERLY ADMITTED.

As the Seventh Circuit recognized, the central issue involved in this case is governed by the same reasoning which this Court used to support its decision in Fare v. Michael C., 442 U.S. 707, 99 S.Ct. 2560, 61 L.Ed.2d 197 (1979). That decision (that a request for the presence of a probation officer during a juvenile's custodial interrogation is not the equivalent of a request for counsel or an invocation of the right to remain silent) was based upon an analysis of the lawyer's unique role in protecting a defendant's Fifth Amendment rights and the inability of a probation officer to fill that role. 422 U.S. at 721, 99 S.Ct. at 2570-2571; Riley, supra, 653 F.2d at 1160.

Almost every reason which makes the probation officer's counsel unsuitable also operates to disqualify the usual parent as an effective substitute for an attorney. The Court of Appeals properly concluded that, "On this basis, we see no grounds upon which to distinguish the request in this case from the one at issue in Fare." Riley, supra, 653 F.2d at 1160. As in Fare, the person whose presence was requested, petitioner's father, was not trained in the law or as an advocate and could not be expected to know when the police might have exceeded the bounds of proper interrogation. Id., 653 F.2d at 1159[4]. Also, there is no privilege comparable to that which shields a client's communications to his attorney that would have protected Riley's communications to his father. Id., 653 F.2d at 1160. Only the last-mentioned factor, that probation officer is an employee of the State, is a truly distinguishing fact. 442 U.S. at 720.

Although ruling only on the question of the effect of the request for a juvenile officer, the Fare opinion is not without clear intimations as to how a majority of this Court might consider requests for the assistance of other nonlawyers. In particular, the opinion points out that "the lawyer is the one person to whom society as a whole looks as the protector of the legal rights of [an accused] in his dealings with the police and the courts." 442 U.S. at 719 [emphasis added]. Furthermore, it is this "pivotal role of legal counsel" which is said to justify Miranda's substitution of a per se rule for decades of Fifth Amendment jurisprudence. 442 U.S. at 72?. Finally, in discussing whether Michael C. had invoked his right to remain silent, this Court specifically drew the analogy between probation officer and parent, endorsed the totality of circumstances test, and clearly implied that the right may be validly waived despite a request for juvenile officer or parent:

> "Where the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent, the totality approach will allow the court the necessary flexibility to take this into account in making a waiver determination." Fare, supra, 442 U.S. at 725 [emphasis added].

The structure of this one sentence indicates beyond question that the Court foresaw two different situations: those where "the age and experience of a juvenile indicate that his request for his probation officer or his parents is, in fact, an invocation of his right to remain silent" and those where the age and experience indicate that the request is not an invocation of the right. 422 U.S. at 725. If only the first situation were possible, then the entire introductory clause of this sentence would be superfluous. The petitioner's claim under Point I is in essence, that every request for the parents is an invocation of the right, and there can be no second situation.

The petitioner of course wants to render irrelevant the considerations of age and experience of the juvenile.

At the time of his arrest he was only eight days away from his seventeenth birthday, and he was no longer living at the parental home but had lived independently of his parents for at least six weeks prior. Riley, supra, 653 F.2d at 1156, 1161. These are extremely relevant facts which go a long way toward establishing what four prior courts have found: petitioner's request for his father was not, in fact, an invocation of his right to remain silent or a request for counsel.

The relationship of parent to child is extremely complex and only vaguely analogous to the attorney-client relationship. Petitioner vastly simplifies the often conflicting interests of parent and child when he advances the "axiomatic" proposition that "the exclusive interest of concerned parents is the welfare of their children." (Petition at 13) There are numerous reported cases in which the efforts of parents during a juvenile's custodial interrogation are shown to have been antagonistic to the best interests of the child. See, e.g. Little v. Arkansas, 435 U.S. 957, 98 S.Ct. 1590, 55 L.Ed.2d 809 (1978).

Petitioner attempts to escape the effect of Fare by claiming a conflict between that opinion and this Court's decision in California v. Prysock, 29 Cr.L 4110 (1981) (Petition at 11) That case does not advance his argument in any conceivable manner. Despite petitioner's claim, this Court in Prysock did not recognize "the value of parental presence during police interrogation" (Petition at 11). There is no mention whatsoever in either the Per Curiam opinion or dissent filed in Prysock of any importance attached to parental presence, much less can this subject be said to be ruled by that opinion. The issue in that case involved the degree of fidelity to the original Miranda warnings which is required to satisfy constitutional requirements. Moreover, the petitioner is not content simply to misrepresent this Court's holding in conclusory terms, he offers implied paraphrases of this Court's holding which are actually nothing more than the complete fabrications of counsel. Consider the following passage:

> "In Prysock this Court recognized the value of parental presence during police interrogation. One useful role parents can serve is to assure the child's understanding of his right to appointed or retained counsel. They can further advise the child whether or not they intend to hire an attorney for the child. If they do not intend to engage counsel, they can clarify the child's understanding of his constitutional right to have counsel appointed before police questioning. 29 Cr L 4110, 4111 (1981)" (Petition at 11).

Not one of these propositions is discussed or in any fashion alluded to in Prysock. The petitioner's citation to that case is in this instance misleading.

There is no conflict between Fare and Prysock for the elementary reason that the two cases decide different issues.

The facts of the present case do not truly present any question of law the resolution of which cannot be confidently determined by reference to the Fare case and other relevant precedents. The Court of Appeals had no difficulty in finding the appropriate rule, and the opinion below is an extremely well-reasoned application of that rule to facts which though different from Fare do not differ in a constitutionally significant way.

## STATE DECISIONS ON THE RIGHT TO PARENTAL COUNSEL

The respondent knows of no debate over the question of whether a state can "constitutionally permit" parental consultation and is willing to concede that a state may statutorily permit such consultation at any time. The real issue in this case, and in other cases cited below, is whether the States are constitutionally required to allow a juvenile to consult with his parents before custodial interrogation can commence. This issue has been considered by many courts and, despite petitioner's citation of nine jurisdictions, respondent submits that only one jurisdiction, Indiana, currently holds, as a matter of constitutional principle, that parental consultation is required.

Moreover, if one seeks a trend in this area, it must be seen that the "growing number of states" are those that hold that there is no constitutional requirement of parental consultation. At least three states, Georgia, Texas, and Arizona, have within the past decade abandoned previous rules requiring parental consultation. Georgia: Riley v. State, 226 S.E.2d 922, 926 (Ga. 1976) overruling Freeman v. Wilcox, 167 S.E.2d 163 (Ga. 1969); Texas: V.T.C.A., Family Cody § 51.09; Arizona: State v. Hardy, 107 Ariz. 583, 491 P.2d 17, (1971), overruling State v. Maloney, 102 Ariz. 495, 433 P.2d 625 (1971). The Texas statutory history is characteristic of a number of states which have recently constricted an originally broad statutory right to parental counsel. See, e.g. Colo. Stat. 22-2-2(3)(c) as amended by L.1971, p. 286 § 3 and Colo. Stat. 19-2-102(3)(c)(I) as amended by L. 1977, p. 237 § 11 (Stat. 19-2-102(3)(c)(I)). After first requiring four prerequisites (1. waiver by both child and attorney; 2. both are informed and understand the right and the consequences of waiver; 3. voluntariness; and 4. waiver in writing) to the valid waiver of a juvenile's rights when originally adopted in 1973, the Texas statute was amended only two years later to allow the admission of a confession "[n]otwithstanding any of the provisions" of the prior law where the State can show that the confession was voluntarily given after defendant received the Miranda warnings. V.T.C.A., Family Cody § 51.09.

Petitioner cites cases from nine jurisdictions in support of his argument that parental consultation is constitutionally required. Respondent submits that at least seven of those jurisdictions do not presently subscribe to that position.

New Jersey: The ruling of In re Carlo, 225 A.2d 110 (1966) which is necessary to the result in that case is that the confession of the defendant therein was not voluntary. Id., at 120[13]. The New Jersey Supreme Court never truly reached the issue of whether, apart from considerations of voluntariness, the confession had to be excluded because of the absence of parental consultation. Five separate reasons are given

for the Court's conclusion that the confession was not voluntary, and the failure to notify the parents, a statutory violation in New Jersey, was cited fifth. It was only after first noting that there were inconsistencies in the defendant's statements, that the defendants were of exceptionally tender age (13 and 15), that the confessions followed "protracted periods of persistent questioning" (6 1/2 hours at two different police stations), and that the environment of the police station was "oppressive" that the Court mentioned the additional factor that the police had failed to permit the parents access to their sons. Id., at 117-119. Also, several New Jersey statutes relating to juvenile detentions were violated by the police, including N.J.S. 2A: 4-33 (since repealed) which provided that no child under 16 be placed in a police station, and N.J.S. 2A: 85-4 which deemed anyone under 16 incapable of committing a crime. The respondent submits that there is no reason to believe that the Seventh Circuit and the Illinois courts would not have reached precisely the same result as the New Jersey Supreme Court in Carlo. Each court would consider all of the relevant factors affecting voluntariness and would arrive at a decision dictated by the evidence considered as a whole and not by an absolute rule of exclusion.

A number of subsequent New Jersey cases have distinguished Carlo and have failed to derive any absolute rule of exclusion from its holding. See State v. R.W., 115 N.J. Super 286, 279 A.2d 709, 714 [1][2] (1971) (twelve-year-old defendant), affd., 61 N.J. 118, 293 A.2d 186 (1972); State in the Interest of J.H., 61 N.J. 108, 293 A.2d 181, 184-185 (1972) (ten-year-old defendant); State in the Interest of A.B.M., 125 N.J. Super. 162, 309 A.2d 619, 622 (1973), affd., 63 N.J. 531, 309 A.2d 617 (1973).

Georgia: As noted above, petitioner's reliance on the decision of the Georgia Court of Appeals in Freeman v. Wilcox, 167 S.E.2d 163 (1969) is misplaced as that case has been overruled, on this issue, by the Georgia Supreme Court in the case of Riley v. State, 226 S.E.2d 922, 926 (Ga. 1976). "To the extent Freeman v. Wilcox, supra, can be read to require an automatic exclusion if the parent is not separately advised

[of the right to counsel], it is disapproved." Riley, supra, 226 S.E.2d at 922.

Massachusetts: Petitioner's authority from Massachusetts, Commonwealth v. Cain, 279 N.E.2d 706 (Mass. 1972), may be shown to be irrelevant from a simple reading of the opinion. Although the conviction in that case was reversed, this was expressly due to the State's failure to show that the defendant had made a knowing and intelligent waiver of his rights. Cain, supra, 279 N.E.2d at 709. The issue for which petitioner cites this case was specifically not decided by the Massachusetts court:

> "Inasmuch as the totality of circumstances in this case is insufficient to show a knowing and intelligent waiver, we need not consider the defendant's further contention that a boy of fifteen years can never waive his right to counsel in the absence of his father, mother, or someone in loco parentis." Cain, supra, at 710.

The Cain case should only be considered authority for those issues upon which it actually ruled.

Maryland: The cited case of Walker v. State, 12 Md. App. 684, 280 A.2d 260 (1971), is another instance of the state court not actually reaching the issue which the petitioner advances. As in Carlo (N.J.), and in Cain (Mass.), the Maryland Court of Appeals based its decision to reverse upon its determination that the State had failed to meet its burden of proving a knowing and voluntary waiver of rights. Indeed, the defendant in Walker did not even receive his Miranda warnings in the first place and his confession was thus, without more, presumptively invalid. Walker, supra, 180 A.2d at 266, 274[12].

Louisiana: The respondent admits that in Louisiana a confession of a juvenile will not be admitted in court where there has been no opportunity for parental consultation prior to the confession, but contends that this result is mandated in that jurisdiction by State in the Interest of Dino, 359 So.2d 586 (La. 1978) which derives this rule from Article I, Sec. 13 of the Louisiana Constitution and certain Louisiana juvenile statutes, not from any federal constitutional precedent. Furthermore, it should be noted that Louisiana is a jurisdiction which requires notification of parents immediately upon

the apprehension of juveniles suspected of crimes. Rev. Stat. La. 13:1577, subd. c.

California: California also does not recognize a general right to parental consultation, People v. Lara, 67 Cal.2d 365, 62 Cal. Rptr. 586, 432 P.2d 202(1967), In re Anthony J., 107 Cal. App. 3d 962, 166 Cal. Rpt. 238, 245[11] (1st Dist. 1980), although a confession will not be admitted where a parental request to see the juvenile defendant was not honored. People v. Level, 172 Cal. Rptr. 904 (Cal. App. 2d Dist. 1981). Absent such request, it is clear that there is no obligation on the State to delay interrogation pending parental presence.

The California case upon which the petitioner relies clearly does not support his position, because the decision in that case, In re Patrick W., 104 Cal.App.3d 615, 163 Cal. Rptr. 848 (1980), did not turn upon the absence of defendant's parents but upon the question of whether the defendant had actually waived his right to an attorney:

> "In Patrick W., however, a 13-year old had expressed reservations about whether he wished to have an attorney, based on uncertainty which he indicated would be resolved only by speaking with his parents. His confession obtained without any attempt by authorities to permit such consultation was thus held invalid." People v. Davis, 110 Cal. App. 3d 151, 167 Cal. Rptr. 783, 787 (2nd Dist. 1980).

Since the request for parents in Patrick W. was directly related to the exercise of the right to counsel, that case is sharply distinguished from the present case in which the District Court has found that petitioner's request for his parents was not for the purpose of seeking counsel. (Appendix B at 7-8).

The California cases which do recognize a limited right to parental consultation can also be explained by the California statutory requirement that a waiver of counsel must be joined in by both the juvenile defendant and the parents. In re Anthony J., supra, 167 Cal. Rptr. at 246, n. 8. However, even with this positive statutory expression of the right which the present petitioner claims, the California courts will still admit a confession obtained in violation of the statute where

voluntariness is established through consideration of the defendant's age plus "such other circumstances as his intelligence, education, experience, and ability to comprehend the meaning and effect of his statement." People v. Lara, supra, 432 P.2d at 599, In re Anthony J., supra, 166 Cal. Rptr. at 246.

Furthermore, it should be noted that the California case of People v. Burton, 6 Cal.3d 375, 491 P.2d 793 (1971), which Justice Marshall cited in his dissent from this Court's first denial of petitioner's petition for writ of certiorari, "has been rendered of doubtful validity by reason of the United States Supreme Court decision of Fare v. Michael C." People v. Level, 172 Cal. Rptr. 904, 913, n.8 (2nd Dist. 1981). Cf. Riley v. Illinois, 435 U.S. 1000, 98 S.Ct. 1657, 56 L.Ed.2d 91, 92 (1978) and Riley, supra, 653 F.2d at 1161.

Pennsylvania: Not only has the absolute rule which petitioner advances been "emphatically reject[ed]" in Pennsylvania, Commonwealth v. Moses, 446 Pa. 350, 287 A.2d 131, 133[1] (1971), but the very case which petitioner cites is careful to note that its holding is based strictly on considerations of voluntariness and does not import any absolute rule:

> "We hold only that when a parent specifically refuses to consent, the Commonwealth has a heavy burden to meet in establishing that the juvenile's waiver was a knowing and voluntary one." Commonwealth v. Roane, 459 Pa. 389, 329 A.2d 286, 288 [1] (1974).

Despite some intimations to the contrary, the Moses case remains controlling law in Pennsylvania, and its rejection of a rule such as the present petitioner proposes could not be more clearly expressed:

> "[I]t is argued that a 'juvenile lacks the ability' to fully understand and assert his constitutional rights and, hence, cannot effectively waive such rights without the advice of a more mature person. We emphatically reject such a prophylactic rule, particularly where a sixteen-year or seventeen-year old is concerned. . .[T]o declare as a matter of law that a sixteen-year old, regardless of maturity and intelligence, is unable to fully understand when he is informed of his constitutional rights and may not by himself waive his right to counsel before being questioned by the police would be to ignore reality and the sophistication of the average sixteen-year old in these days and times." Commonwealth v. Moses, supra, 287 A.2d at 133[1].

Moses has been subsequently reaffirmed in the cases of

Commonwealth v. Porter, 449 Pa. 153, 295 A.2d 311, 313 (1972), Commonwealth v. Davis, 455 Pa. 142, 314 A.2d 313, 315 (1973), and Commonwealth v. Thomas, 392 A.2d 820, 822 (Pa. Super. 1978).

Summary: As detailed above, the respondent concedes only that an absolute rule requiring the provision of parental consultation as a prerequisite to a valid waiver of the right to counsel exists as a matter of constitutional right in the State of Indiana and as a result of statutory enactment in the States of Colorado, Louisiana, and, where specifically requested, in California.[1]

In addition to the states listed above which have specifically declined to adopt the rule advanced by the present petitioner (i.e., Pennsylvania, Massachusetts, Maryland, and New Jersey), and the states which have once adopted but since abandoned the rule (Texas, Arizona, and Georgia), the respondent would observe that the vast majority of states and federal districts have always decided questions of waiver of Fifth Amendment rights on the ground of voluntariness with parental counsel being only one factor in the totality of the circumstances. The following cases illustrate the rule in those jurisdictions:

Arkansas: Shipman v. State, 261 Ark. 559, 550 S.W.2d 424, 248 (1977).

Connecticut: State v. Oliver, 160 Conn. 85, 273 A.2d 867, cert den.402 U.S. 946 (1971).

Florida: State v. Francois, 197 So.2d 492, 494 (Fla. 1967).

Illinois: People v. Pierre, 114 Ill. App.2d 283, 252 N.E.2d 706, 714 (1969), cert. den. 400 U.S. 854.

Iowa: Interest of Thompson, 241 N.W.2d 2, 6 (Ia. 1976).

Kansas: State v. Young, 220 Kan. 541, 552 P.2d 905, 910-911 (1976).

Kentucky: Hayden v. Commonwealth, 563 S.W.2d 720, 722[4] (Ky. 1978).

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[1] Although not cited by petitioner, the states of Alabama and Oklahoma also appear to have statutes creating a right to parental counsel. ALA. CODE § 12-15-67; OKLA. STAT. tit. 10, § 1109(a) (West Supp. 1979).

Minnesota: State v. Hogan, 297 Minn. 430, 440, 212 N.W.2d 664, 471 (1973)

Nebraska: State v. Stewart, 197 Neb. 497, 250 N.W. 2d 849 (1977)

Nevada: Marvin v. State, 95 Nev. 846, 603 P.2d 1056, 1058, n. 4 (1979).

New York: People v. Stephen, J.B., 23 N.Y. 611, 298 N.Y.S. 489, 246 N.E.2d 322, 348-349 (1969).

North Carolina: State v. Dawson, 278 N.C. 351, 180 S.E.2d 140 (1971).

Ohio: State v. Carder, 3 Ohio App.2d 381, 210 N.E.2d 714, 719 (1965).

Oregon: State v. Raiford, 7 Or. App. 202, 490 P.2d 206 (1971).

Tennessee: Braziel v. State, 529 S.W.2d 501, 506 (Tenn. Ct. CR. App. 1975).

Texas: In re Garcia: 443 S.W.2d 594, 598 (Tex. Cr.App. 1969).

Utah: State v. Hunt, 607 P.2d 297 (Utah 1980).

Virginia: Harris v. Commonwealth, 232 S.E.2d 751, 754 (Va. 1977).

Washington: State v. Prater, 77 Wash. 526, 463 P.2d 620, 644 (1970).

Wisconsin: Theriault v. State, 66 Wis.2d 33, 223 N.W.2d 850, 854 (1974).

Wyoming: Mullin v. State, 505 P.2d 305, 309 (1973) cert. den. 414 U.S. 940.

Respondent does not claim that each of the above-cited cases rules the precise issue involved in the present petition, whether the request for a parent is tantamount to a request for counsel, only that those jurisdictions have expressly declined to adopt a constitutional rule which would require parental consultation as a prerequisite to valid custodial interrogation.

The New York case of People v. Stephen, J.B., supra, is typical of this line of cases, and its holding offers a good summary of the current view of most states on this issue:

> "We cannot accept the suggestion that every minor is as a matter of law incompetent to waive his constitutional rights to remain silent and to an attorney unless the waiver is consented to by a parent or guardian who has himself been advised of the minor's rights. . . [W]hether a minor knowingly and intelligently waived these rights is a question of fact and a mere failure of the police to seek the additional consent of an adult will not outweigh, in any given instance, an evidentially supported finding that such a waiver was actually made." People v. Stephen, J.B., supra, 246 N.E.2d at 348-349, citing, i.a., People v. Lara, supra.

The current petitioner has offered no compelling reason why this present practice of the states, which gives full consideration to the true circumstances of each case and to the situation of each defendant, should be unilaterally overturned by this Court and replaced by an arbitrary presumption of constitutional violation.

II

WHEN CONSIDERATION IS GIVEN TO THE TOTALITY OF THE CIRCUMSTANCES, THE PETITIONER'S CONFESSION AND HIS WAIVER OF RIGHTS MUST BE SEEN AS VOLUNTARILY GIVEN AS DETERMINED BY THE COURT OF APPEALS AND EVERY OTHER COURT WHICH HAS CONSIDERED THIS CLAIM.

Although the petitioner asserts that both his confession and his waiver of rights were involuntarily extracted from him as evidenced by the totality of the circumstances attending his arrest and custodial interrogation, petitioner also questions the "totality of the circumstances" approach and urges this Court to "reexamine the efficacy" of that test. (Petition at 15) Respondent submits that the "totality of the circumstances" test remains the most valid and constitutionally desirable method of evaluating the voluntariness of juvenile confessions and is preferable to any proposed absolute (i.e. "per se") or other arbitrary rule.

This Court has consistently applied the totality of circumstances test, Haley v. Ohio, 332 U.S. 596 (1948), Gallegos v. Colorado, 370 U.S. 49 (1962), and has reaffirmed its validity in Fare v. Michael C., 442 U.S. 707, 725 (1979). A recent article which examines in depth the merits of the current approach versus the alternative absolute rule endorses the continued application of the totality of the circumstances test. See Krastek, "The Judicial Response to Juvenile Confessions: An Examination of the Per Se Rule," 17 Duquesne Law Review 659, 685-686 (1980).

Considering petitioner's confession in light of the totality of the circumstances, the respondent submits that all four prior courts which have determined the confession to have been voluntarily given were correct in their evaluation of the evidence. See People v. Riley, 49 Ill. App.3d 304, 364 N.E.2d 306 (1977); United States ex rel. Riley v. Franzen, 653 F.2d 1153 (7th Cir. 1981). The petitioner was almost seventeen at the time of his arrest, Riley, supra, 653 F.2d at 1163, and he was detained for only two hours before confessing. Id., at 1163.

He was orally advised of his right to an attorney and of his right to remain silent. Id., at 1163. There is no evidence of any mistreatment or of physical or psychological coercion, and petitioner actually was acquainted with one of his interrogators. Id., at 1163. Although petitioner may have been discomfited by the removal of his outer clothes, this was necessary in order to test for evidence, and the petitioner was provided with a blanket, while the room was not uncomfortably cool. Riley, supra, at 1163.

The factors which petitioner claims establish the involuntary character of his confession are summarized in the following argument:

> "Where the Court of Appeals and the District Court factually determined that Thomas Riley had requested to see his father but was not permitted to do so until after he had confessed, and where the Court of Appeals and the District Court found so many relevant factors which substantiate Thomas Riley's claim that his confession was wrung from him by unconstitutional means, it follows that the . . . .confession and waiver of rights are not legally sufficient to withstand the totality of the circumstances scrutiny. Under such circumstances the confession must be suppressed." (Petition at 15-16)

The sole authorities cited for this proposition are the dissenting opinion of Justice Powell in Fare v. Michael C., 442 U.S. 707, 732-734 (1979) and an opinion of the Arizona Court of Appeals: State v. Brooks, 127 Ariz. 130, 618 P.2d 624 (1980). Brooks does not advance petitioner's argument at all, since the defendant's confession was admitted in that case and his conviction affirmed despite a clearly more oppressive factual background. Brooks, supra, 618 P.2d at 628 [defendant stripped and thrown in cell clad only in his underwear].

Petitioner's second point simply seeks to relitigate a question of the application of Fifth Amendment law to the facts of his case. Four prior courts have failed to find his waiver of Fifth Amendment rights to have been involuntary or unknowing. The lengthy opinion of the Court of Appeals, 653 F.2d 1153, evidences a particularly searching examination of both state and federal records, and its findings and resolution of this issue are not shown to have been erroneous in any way by the present petition.

III

THE PRESENT PETITION SHOULD BE DENIED BECAUSE IT RAISES, ON A SUBSTANTIALLY SIMILAR RECORD, ISSUES IDENTICAL TO THOSE RAISED BY THIS PETITIONER IN HIS FIRST APPLICATION TO THIS COURT. THE DENIAL OF THAT PETITION SHOULD BE GIVEN A LIMITED PRECEDENTIAL EFFECT WITH THE RESULT THAT CERTIORARI, IN THIS ONE PARTICULAR CASE, SHOULD NOT BE GRANTED.

The present petitioner seeks review by this Court of his 1975 convictions for murder and manslaughter. The grounds for review involve precisely those issues which were litigated at every stage of this case and which formed the basis for petitioner's 1978 petition for writ of certiorari. 435 U.S. 1000 (1978). Riley, supra, 653 F.2d at 1159, n.15. Although the present petition seeks certification of a slightly enhanced record which includes the District Court's evidentiary hearing, the identical issue of law is again advanced on functionally identical facts, and every reason, albeit unexpressed, which led this Court to deny certiorari in the first place should mandate that certiorari be again denied.

The respondent is fully aware of the several precedents which hold that a denial of certiorari means nothing as well as those which hold that it means nothing much. That a contrary view is possible with regard to habeas corpus cases is best illustrated by Justice Jackson's dismissal of the first position as "untenable" and the second as "unintelligible". Brown v. Allen, 344 U.S. U.S. 443, 542, 73 S.Ct. 397, 428 (1953) per Jackson, J., dissenting.

Justice Jackson writing in 1953 highlights, as a reason for abandoning the traditional view, the later custom of this Court of noting dissents from denials of certiorari. "Lawyers and judges will not readily believe that Justices of this Court are taking the trouble to signal a meaningless division of opinion about a meaningless act." 344 U.S. at 543. This factor is particularly relevant in the present case where the dissents of Justices Marshall and Brennan were noted in the earlier denial and a substantial opinion in dissent was filed by Justice Marshall. 435 U.S. 1000. The reasons which Justice Marshall advanced for the grant of certiorari are

precisely those reasons now presented again to this Court in the guise of a new petition for certiorari, and a very extensive congruity of authority relied on will also be noted. Since Justice Marshall so thoroughly championed the present petition's central tenets in his dissent, it simply cannot logically be claimed that the other judges of the Court were not aware of these issues. Although their votes to deny certiorari may of course have been motivated by other considerations, those reasons for denial must be thought still to pertain to this petition in the very same case.

Petitioner's entire constitutional argument is based upon the fact that he requested to see his father and this request was not granted. This fact is fully proved by the prior record as well as by the present one. If that fact alone entitled the petitioner to Constitutional relief then surely this Court would have recognized the same on its first consideration of the issue:

> "If a state is really obtaining conviction by laws or procedures which violate the Federal Constitution, it is always a serious wrong, not only to a particular convict, but to federal law. It is not probable that six Justices would pass up a case which intelligibly presented this situation." Brown v. Allen, supra, 344 U.S. at 544, per Jackson, J., dissenting [emphasis added].

Actually, the earlier record in this case was, if anything, stronger in petitioner's favor as the Illinois Appellate Court reached its decision in light of unresolved conflicting testimony as to whether petitioner's father had in fact requested to see his son, Riley, supra, 364 N.E.2d at 308, while the Court of Appeals decision is based upon an affirmative finding that the father "had indicated that he did not wish to see his sons." Riley, supra, 653 F.2d at 1162, n.19.

To again quote Justice Jackson on what should be the effect of a denial of certiorari:

> "It creates no precedent and approves no statement of principle entitled to weight in any other case. But, for the case in which certiorari is denied, its minimum meaning is that this Court allows the judgment below to stand with whatever consequences it may have upon the litigants involved under the doctrine of res judicata as applied either by state or federal courts." Brown v. Allen, supra, 344 U.S. at 543, Jackson, J., dissenting.

Although the opinion of Justice Jackson represents only his view on this issue, the case of Brown v. Allen appears to be the last case in which this Court has discussed this issue in any detail, and the present rule of no precedential effect was approved in Brown by only a five to four majority. The issue is ripe for reconsideration, particularly due to the now more widespread practice of filing dissenting opinions in certiorari denials. Moreover, a recent opinion of this Court has indicated that the former rule may be relaxed in cases wherein a dissent is filed by noting that the strong dissents of certain judges and failure of others to join in dissent "surely are not without some significance as to their and the Court's attitude . . ." United States v. Kras, 409 U.S. 434, 443, 93 S.Ct. 631, 637 (1973). Should this Court decide to grant this present petitioner's Petition for Writ of Certiorari, respondent asks that it also consider the question of whether review is limited by the prior denial of certiorari or whether certiorari has been improvidently granted because of the prior denial. "[C]all it res judicata or what one will, courts ought not to be obliged to allow a convict to litigate again and again exactly the same question on the same evidence." Brown v. Allen, supra, Jackson, J. dissenting, 344 U.S. at 544.

## CONCLUSION

For the foregoing reasons, respondent prays that the petition for Writ of Certiorari be denied.

Respectfully submitted,

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81-5324

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# AFFIDAVIT

Darrell Panethiere, being first duly sworn on oath, deposes and states as follows:

1. That your affiant is an Assistant Attorney General assigned to the Criminal Justice Division of the Office of the Attorney General of Illinois.

2. That in his capacity as an Assistant Attorney General your affiant was assigned the preparation of the Respondents' Brief in Opposition in the case of Riley v. Franzen, Docket No. 81-5324.

3. That your affiant is a member of the bar of this Court having been admitted on September 18, 1981.

4. That to your affiant's knowledge fifteen (15) copies of the Brief in Opposition in the above-entitled case were mailed to the Clerk of this Court on September 29, 1981, having been deposited at the United States post office located at 164 North Clinton Street, Chicago, Illinois 60606, with first-class postage prepaid.

FURTHER AFFIANT SAYETH NOT.

Darrell Panethiere
Darrell Panethiere

SUBSCRIBED AND SWORN TO
Before me this 29th day
of September, 1981.

Carole E. Stanley
NOTARY PUBLIC